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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

No. 85-1094

ALWIN E. HOPFMANN, GREGORY HESSION, CLARENCE PERKINS, CLARENCE PAULIN and BETH SULLIVAN,

Appellants,

v.

MICHAEL JOSEPH CONNOLLY, FRANCIS X. BELLOTTI, CHESTER G. ATKINS, and the DEMOCRATIC STATE COMMITTEE OF MASSACHUSETTS,

Appellees.

On Appeal from the United States Court of Appeals for the First Circuit

Opposition To The Motion Of Appellees Atkins And The Democratic State Committee To Dismiss Or Affirm

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I. CONCERNING THE CHALLENGE TO APPELLANTS' ASSERTION OF JURISDICTION

Opening the argument (p.30), these appellees assert, (See also the other motion (n.1)), that "no state statute has been invalidated," and that, therefore, "NO APPEAL LIES TO THIS COURT UNDER 28 U.S.C. 1254 (2)." Appellants rely upon the pre-emption doctrine set out in Malone v White Motor Corp., 435 US 497 (1978). The statutory language provides that cases in the courts of appeals may be reviewed:

> "By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution,...of the United States,..."

Malone holds that the courts of appeals need not articulate that they are holding the statute in question to be invalid in order for the appeal to lie. It is sufficient if the effect of their holding is to pre-empt the state statutes.

The statute 1973 Mass. Acts c.429

specifically revoked authority for party pre-primary conventions, as appellants have brought up several times. That 1973 Act removed the language authorizing parties to have such conventions from the General Laws and, with one exception, which appears to have been an oversight, removed from the general laws parallel references to such conventions, including former language cross-referencing to them as an alternative method of ballot access. (Jurisdictional Statement, pp. 8-14, and pertinent text of the Act in Appendix) On the other hand these appellees insist that the 15% rule is part of the statutory scheme, and even accuse the appellants of attacking the statutory scheme itself rather than attacking their trick of alleged "incorporation" of a private rule

into that scheme. By simple deductive logic it is obvious that a statute repealing all authority for such conventions and a rule requiring them cannot both be valid statutes. If one is valid then the other is invalid by pre-emption, whether the court deigns to articulate that pre-emption or not. The lower court has upheld the rule as a statute. Therefore the 1973 Act has been pre-empted and held invalid. Silence on the point doesn't alter the fact of the invalidation by pre-emption. This, as appellants understand it, is the Malone pre-emption doctrine. It is a wise doctrine, and a needed one, as this case illustrates, one which would seem to prevent judges from frustrating appeals to this Court by ignoring the pre-emption

which they have effectively decreed.

Another point should be made in refutation of the argument of appellees that there is no jurisdiction for an appeal: They argue that an "accomodation" has taken place so that the party rule has become part of the state statutory scheme. The "accomodation" is itself a pre-emption of the statutory provisions as they stood. Both the 1973 Act, with its clear intent to eliminate party pre-primary conventions as part of the nomination process, and the language of the statutory provisions, as it has stood for many years, make clear that the asserted federal First Amendment right which the party insiders claim gives them the right to insert their private rule into the statutory scheme pre-empts the statutory provisions making the

"method of nomination papers" exclusive. The history of the statutes involved shows clearly that since the "LaFollete Reforms" swept the country at the turn of the century, Massachusetts has had the "method of nomination papers" as the only requirement for ballot access, except for the period from 1953 until 1973, when pre-primary party convention nomination was made an alternative method. That language stood for over 80 years prior to the SJC's upholding the party's claim of this unusual First Amendment power and no one during that entire time ever claimed that it allowed political parties to impose additional burdens on ballot access. This pre-empting claim of First Amendment authority has now been upheld in turn by both the district and circuit

courts, as all appellees admit. No assertion has ever been made in this litigation that the provisions of the state statutory scheme did not make the "method of nomination papers" the only requirement for ballot access prior to the SJC's discovery of the claimed extension of the First Amendment freedom of association in its "exhaustive" 17 day analysis.

See notes 1-3, and 9 in the Jurisdictional Statement and the fuller text in the Appendix for the language of the provision, from which we excerpt here to reemphasize the point, and for the holdings of the state's highest court on statutory interpretation:

> "Candidates shall be elected, in primaries...no candidate shall be nominated in any other manner than is

> provided in this chapter... no names shall be printed on a ballot other than those presented on nomination papers....Primaries shall be held for the nomination of candidates of political parties for all offices to be filled at a state election....The nomination of candidates for nomination at state primaries shall be by nomination papers... Ballots... shall contain the names of all candidates duly nominated...."

(emphasis added) There is nothing unclear about this language. Exegesis of the kind resorted to here in order to perpetrate this ruse (J.S., pp. 59-60) violate state and federal canons of statutory interpretation. The holding of the court of appeals affirming the district court's deferral to the state court on the constitutional questions pre-empts these clear statutory provisions as a matter of law regardless of the evasion by the court of the consequence of its action. If

nomination is by primary, if the only way to get on the primary ballot is by nomination papers, and if all who've their nomination papers are to be on the ballot, then these provisions are pre-empted by the "incorporated" rule's requirement of a supplemental showing of support at the convention which the legislature rejected. Further, where as here, the choice of the party's candidate is made at the convention, the statutory provisions are clearly pre-empted, unless one buys off on the notion that the mere unexercised possibility of a write-in candidacy is adequate compensation for this "jaybird" blockage of access to the ballot in violation of the opinion of a majority of this Court in Lubin v Panish, 414 US 709 (1974) and the single justice opinion in

McCarthy v Briscoe, 429 US 317, a notion which the appellees and the lower courts have advanced.

Appellants are aware of the success of the appellees up to this point in their attempts to obscure the reality of this pre-emption. Appellants acknowlege that neither the appellees nor the lower courts have admitted that the rule and the state statutory scheme are in conflict. They, have, as it were, stuck to the game plan. But logic dictates what political expediency refuses to acknowledge. Neither the 1973 Act nor the state statutory scheme as it reads and was understood prior to the introduction of the alleged extension of the First Amendment freedom of association can exist and be valid simultaneously with the addition of the rule to the statutory

scheme. So whether the appellees call it "accomodation," "incorporation," "adding to," "as though it were explicitly contained therein," or whatever, in their struggle to preserve this coup d'etat of a political machine against the Constitution, the truth is that the party rule has pre-empted the state statutory law as it was in a manner that the legislature itself, as the only lawmaking body that the state law itself recognizes, decisively rejected. If the statutory scheme so readily "accomodates" the rule why did the legislature reject the changes on no less than 8 occasions ?

Appellants challenge the deference which the lower federal courts have given the federal constitutional interpretation rendered by the state court in this case.

Appellees now acknowledge that the lower federal courts have made no independent analysis of the 1st and 14th Amendment questions at issue, but have instead deferred to the "exhaustive" analysis of the SJC. Curiously, these appellees, state in the 2d paragraph of their argument summary (p.24) that:

> "Hopfmann's argument that the Massaschusetts Democratic Party did not have the right under the First and Fourteenth Amendments to the United States Constitution to adopt the '15% Rule' and have it enforced by the state has already been exhaustively refuted by the Massachusetts Supreme Judicial Court in its comprehensive and well-reasoned unanimous opinion...."

In the immediately preceding paragraph they stated that the First Circuit had upheld a state statutory scheme against federal constitutional attack and that the appellants have presented no substantial

federal questions. It is a curious world, is it not, in which federal constitutional rights change the long understood meanings of state statutory schemes and then, voila', become a part thereof so as to be immune from federal scrutiny forevermore ?

Three members of the Court have noted: "The Massachusetts Supreme Judicial Court construed Chapter 53 to recognize the Democratic party's 15% rule because it believed that such a construction was required by the United States Constitution in order to avoid an impermissible infringement of the associational rights of party members." Bellotti v Connolly, 460 US 1057 (1983) (p. 2 of the dissent by Stevens, Rehnquist and O'Connor.) In granting cert in the present case before,

this Court characterized the application of the claimed combination of the freedom of association right to make the rule and be governed by it, plus the private lawmaking authority to add it to the statutory scheme as "the provision, as enforced by Mass. Gen. Laws Ann. ch. 53,." The provision is "enforced" by the statutory scheme by virtue of the state court interpretation of the Constitution. Without the federal constitutional interpretation the statutes would not permit enforcement of the rule. But with it, it does. Therefore pre-emption does exist. The statutory scheme was used to enforce the right because of the power of the perpetrators of the plan to establish the primacy of the party rule to do so, as opposed to the Connecticut Republican

Party group in Tashjian, supra, that openly acknowledged the conflict and directly and openly challenged the statute. But then they did not have the same advantages of entrenched incumbency.

If this tactic designed to deprive the appellants of their right of appeal is rewarded with success by the failure of this Court to recognize that pre-emption does exist despite the obfuscation, then the tactic will be repeated. Future litigants who stand on constitutional rights against the politically powerful will be deprived of their appeal to this Court by use of the same tactic. A very dangerous precedent will be set under which lower courts can deprive litigants of their appeal to this Court by refusing to acknowledge that pre-emption occurred

when motivated to do so. All that will be needed will be an assertion of a right to "add" private rules to state laws. There will be those entrenched in incumbent political machinery who will do just that if the temptation is there.

Combined with the silent recognition of a hitherto unheard of private right to make public laws which these appellees have previously urged, and which the SJC has recognized and articulated without supporting authority, and to which the lower federal courts have deferred, this tactic of refusing to acknowledge pre-emption when it exists could result in an activist judiciary allied with powerful political party organizations reshaping many state laws despite the wishes of legislatures. Once established such power

surely would not be narrowly confined.

II. A NOTE ON SMILEY V HOLM

This is the second time that these appellees have argued that the adding of this party rule to the state statutes by a state court's interpretation of the federal Constitution complies with the mandate of Art.I, Sec.4 as interpreted in Smiley v Holm, 285 US 355 (1932). Curiously, they never seem to argue it below and the courts below have never mentioned the case. Nor has the state court mentioned it in its exhaustive analyses. Smiley makes it clear that what Art.I, Sec.4 means is that a state prescribes for congressional elections in the same manner which its laws prescribe for making all its laws. It seems incredible that these appellees would

seriously argue that laws are normally made in Massachusetts by groups within private organizations asserting extensions of emanations from the First Amendment which are then enforced by complaisant state officials pursuant to state court advisory opinions, particularly in the situation where the legislature has so emphatically rejected the alleged "law" in question by all means available to it. Perhaps appellees feel that they can blunt the insight of the members of this Court in some special way. The direct challenge to the holding of this Court in that case remains one of the strongest reasons why this Court should note jurisdiction here.

III. A NOTE ON "ELECTION DAY DEMOCRATS"

No amount of diversion will obscure that it was a small group of the party

concerned with making the "insider" machinery more dominant which launched the Charter Commission to produce the Charter in which the revival of the pre-primary convention was to be wrapped. It was most of the registered membership of the party, not "election day Democrats," who were not given any real say in the formulation of the 15% Rule. In a party of 1.3 million, the number involved at any stage in even the secondary level of participation -- selecting convention delegates -- was never more than 7.6%. The conventions were attended by 1/4 of 1% of membership and the rule was adopted as part of the charter by .06% of membership. By statute, only independents can register on the day of the primary and vote as party members. So the allegation of "raiding"

is obviously an unsubstantiable ploy and the use of the term "regular" is an attempt to create confusion between the real regular membership of some 1.3 million and the insiders attempting to concentrate private lawmaking authority in their own hands. Fear of possible influence of the candidate selection decision by those enrolled as independents signing ballot papers or enrolling as Democrats at the 11th hour is hardly justification for the removal of full participation in the candidate selection process from the over 90% of the party's regular members, members enrolled for some time. Appellees can say what they will, the inescapable truth is that this is a principle of "bossism" not one of freedom of association. While this word may be

sometimes too loosely applied in popular parlance, it fits here. Jurisdiction should be noted to make clear that the vital constitutional rights argued by the appellants are not to be twisted to deprive of their political liberties those whom they were designed to protect. The Court has not dealt with such misuse of the First Amendment in its prior decisions, possibly because such a bold attempt to use the freedom of association concept to defeat the purposes for which it was conceived has not heretofore been attempted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served, by United States mail, First Class, postage prepaid, this ____day of February, 1986, true and accurate copies of the foregoing Opposition To The Motion Of Appellees Atkins And The Democratic State Committee To Dismiss Or Affirm upon Thomas R. Kiley, Esquire, Assistant Attorney General, One Ashburton Place, Room 2001, Boston, Mass. 02108, Counsel of Record for appellees Connolly and Bellotti, 3 copies for each appellee, and upon Keith C. Long, Esquire, Herrick and Smith, 100 Federal Street, Boston, Mass. 02110, Counsel of Record for appellees Atkins and The Democratic State Committee, 3 copies for each appellee.

_____

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